

1994

Doreen Marie Wygant, aka Doreen Marie Baldino, aka Doreen Marie Neal v. Richard T. Wygant : Brief of Appellee

Utah Court of Appeals

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Richard T. Wygant; Appellant, Pro Se.

Roger K. Tschanz; Attorney for Appellee.

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FILED
Utah Court of Appeals

NOV 25 1994

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

DOREEN MARIE WYGANT,
aka DOREEN MARIE BALDINO,
aka DOREEN MARIE NEAL,
Plaintiff and Appellee,

vs.

RICHARD T. WYGANT,
Defendant and Appellant.

Case No. 940048-CA

The priority number of the case as set forth in Rule 29(b) is 15

BRIEF OF APPELLEE

APPEAL

Appeal from the Third District Court of Salt Lake County

Judge Timothy R. Hanson

940048

Richard T. Wygant
Pro Se Defendant and
Appellant
820 West Fremont Avenue
Salt Lake City, Utah 84104

Roger Tschanz [3290]
Attorney for Plaintiff and
Appellee
2400 West 7800 South #209A
West Jordan, Utah 84084

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STATEMENT OF JURISDICTION

The Court of Appeals does not have jurisdiction of this matter as defendant/appellant did not appeal from the decree of divorce within the time allowed by Rule 4(a) of the Utah Rules of Appellate Procedure. The memorandum and decision order of Judge Hanson is not a final order by which an appeal can be taken pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND
STANDARD OF REVIEW

Can defendant/appellant invoke the jurisdiction of the Court of Appeals when he filed no appeal within 30 days after the date of entry of judgment of decree of divorce?

Notwithstanding defendant/appellant's failure to file a timely appeal of the judgment of decree of divorce does the memorandum and decision order of Judge Hanson dated and filed December 16, 1993 constitute a final order that can be appealed?

The standard of review is whether or not Judge Hanson's memorandum decision and order dated and filed December 16, 1993 is a final order contemplated by Rule 3(a) as appealable.

STATUTES AND RULES

Rule 3(a) of the Utah Rules of Appellate Procedure:

"An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court in the time allowed by Rule 4". [balance deleted]

Rule 4(a) of the Utah Rules of Appellate Procedure:

"In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from". [balance deleted]

Rule 6-404(1) of the Utah Code of Judicial Administration:

"Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause".

U.C.A. 30-3-35(2):

"If the parties do not agree to a visitation schedule, the following schedule shall be considered the minimum visitation to which the noncustodial parent and the child shall be entitled". [the specific schedule is deleted, reference is made to the remainder of the statute and is incorporated by reference].

STATEMENT OF THE CASE

A decree of divorce was entered in the case of Wygant vs. Wygant on September 13, 1988. That the court entered an order of custody for Mrs. Wygant and provided visitation for Mr. Wygant. The visitation order provides as follows: "Reasonable rights of visitation in the defendant, provided, however, the Court orders that the defendant's visitation rights be limited due to his lack of concern regarding the education of the parties' minor children in that he failed to return them promptly after his visitation so that they could attend year-round school".

Mr. Wygant (defendant/appellant) then attempted to modify the decree by means of a non-evidentiary order to show cause hearing before the Honorable Domestic Commissioner Thomas Arnett. Commissioner Arnett recommended that the order to show cause be dismissed. Mr. Wygant objected to the recommendation. Judge Hanson adopted the recommendation in his memorandum decision and order, a copy of which is attached as an exhibit to Mr. Wygant's appeal. Mr. Wygant ~~appealed~~ from that memorandum decision and order. Mr. Wygant did not appeal the decree of divorce until the present appeal was filed.

SUMMARY OF ARGUMENTS

Approximately five and a half years after the judgment and decree of divorce is entered, Mr. Wygant appeals the visitation order. If Mr. Wygant was dissatisfied with the trial result he had 30 days after entry of judgment to file an appeal. He failed to do this. The court does not have jurisdiction to entertain his arguments at this late date.

ARGUMENT

Lack of jurisdiction can be raised at any time. There are numerous cases to support that statement, however perhaps two will suffice; Olson v. Salt Lake School District, 724 P.2d 960 (Utah 1986), and A.J.MacKay Co. v. Okland Const. Co., 817 P.2d 323 (Utah 1991). Plaintiff/Appellee attempted to dispose of this appeal both by a suggestion of mootness and a motion to dismiss appeal. The suggestion of mootness was granted then subsequently denied, the motion to dismiss was denied. The fundamental matter of jurisdiction cannot be waived or acquiesced to by the parties. The Court itself is never prohibited from addressing jurisdiction at any time in the proceedings, regardless of whether or not the parties choose to address jurisdiction. The parties can also bring the matter to the attention of the Court at any time.

Therefore, plaintiff/appellee did not waive a jurisdictional claim by attempting to dispose of the case by other means.

Defendant/Appellant wants this court to overturn an order of the 1988 decree by an opinion that would give retroactivity to UCA 30-3-35. Mr. Wygant wants the Court of Appeals to act as some sort of super-legislative body.

The Court's primary responsibility in construing legislation is to give effect to the intent of the legislature; Christensen v. Industrial Commission, 642 P.2d 755, 756 (Utah 1982). One of the fundamental rules of statutory construction is that the statute should be interpreted according to its plain meaning, State v. Jones , 735 P.2d 399, 402 (Utah App. 1987).


Mr. Wygant bases his appeal upon UCA 30-3-35, well, sort of, because the statute on its face does not give retroactive application by any sort of implication. The statute is unambiguous on its face. The statute was effective May 3, 1993 and doesn't breath or hint retroactivity. However, Mr. Wygant is attempting to apply a 1993 statute to a 1988 divorce without any assistance whatsoever from the legislature. Mr. Wygant has a way around this problem; bring his 1988 divorce before the trial judge on a modification and avoid any retroactivity argument. Mr. Wygant has done this. Judge Hanson will try the modification and at that hearing the 1993 statute is clearly relevant and the Judge can rule appropriately.

All of which tends to support Rule 6-404(1) of the Utah Code of Judicial Administration; a party cannot use an order to show cause as a vehicle to modify a decree.

STATEMENT OF RELIEF SOUGHT

Defendant/Appellant's appeal be dismissed for lack of jurisdiction.


Respectfully submitted this 25th day of November, 1994.



Roger Tschanz
Attorney for Plaintiff/
Appellee

Mailing Certificate

I certify that this 25th day of November, 1994 I served two copies of the attached brief of appellee upon Richard Wygant pro se appellant in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address: 820 West Fremont Avenue, Salt Lake City, Utah 84104



Roger Tschanz
Attorney for Plaintiff/
Appellee